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Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth St., SW
Washington, DC 20554

May 17, 2001

87-8

Dear Ms. Salas:

Attached please find a copy of UCC, *et al.*'s Opposition to Emergency Petition for Stay by Sinclair Broadcasting Group, Inc. which was filed electronically yesterday evening via the Commission's ECFS electronic mail system. A copy of the ECFS transmittal receipt is attached.

UCC, *et al.* files this copy today in a more readable format than allowed by the ECFS electronic mail system.

Sincerely,

Cheryl A. Leanza
Counsel for UCC, *et al.*

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*Before the*
**FEDERAL COMMUNICATIONS COMMISSION**
**WASHINGTON, D.C. 20554**

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| In the Matter of | ) | |
| | ) | |
| Review of the Commission's Regulations Governing Television Broadcasting | ) | MM Docket No. 91-221 |
| | ) | |
| Television Satellite Station Review of Policy and Rules | ) | MM Docket No. 87-8 |

# UCC, *et al.* OPPOSITION TO EMERGENCY PETITION FOR STAY BY SINCLAIR BROADCASTING GROUP, INC.


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**UCC, *et al.* OPPOSITION TO EMERGENCY PETITION FOR STAY BY SINCLAIR BROADCASTING GROUP, INC.**

The United Church of Christ Office of Communication, Inc., Black Citizens for a Fair Media, Center for Media Education, Civil Rights Forum, League of United Latin American Citizens, Philadelphia Lesbian and Gay Task Force, Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights, Wider Opportunities for Women, and Women's Institute for Freedom of the Press ("UCC, *et al.*") respectfully oppose the Emergency Petition for Stay ("Stay Petition or Petition") filed on May 4, 2001 by Sinclair Broadcasting Group, Inc. ("Sinclair").[1]

## I. INTRODUCTION and SUMMARY

As a preliminary matter, UCC *et al.* encourage the Commission to deny Sinclair's request in a thoughtful and well-reasoned order. While UCC *et al.* are mystified at the D.C. Circuit's decision to grant Viacom and CBS a stay of its divestiture, Fox Television Stations, Inc. v. FCC, No. 00-1222 (D.C. Cirl. apr. 6, 2001), particularly given the jurisdictional questions at issue in that context, UCC *et al.* believe that the Commission's failure to provide any reasoning supporting its decision for the court surely contributed to the court's decision to reverse the FCC. *Order*, FCC 01-94

[1] Pursuant to Section 1.46 of the Commission's rules, UCC, *et al.* filed a Motion for Extension of Time to file this Opposition on May 11, 2001. Sinclair opposition this Motion on May 14, 2001.

(rel. Mar. 14, 2001). Sinclair's self-created deadline of May 18, 2001 should be no bar to the Commission it if desries to issue a well-reasoned order. Sinclair need not dissolve its LMAs until August 6, 2001–almost three months hence. If the Commission requires more time to respond to Sinclair, the Commission could easily issue a short order or a press release on May 18, 2001 explaining that a detailed order will be forthcoming. Such a delay would be justified in any event, but it would be particularly justified in light of Sinclair's failure to serve or notify interested parties and UCC, *et al.*'s request for an extension of time to oppose Sinclair's request. If the Commission elects to continue its current practice of refusing to act on petitioners' self-created deadlines, it should issue an order explaining that the time allotted by Sinclair was insufficient for a complete review of the issues raised in Sinclair's petition.

In sum, Sinclair has not made its showing under the applicable standard in *Virginia Petroleum.* It has not met its burden to show that it will suffer irreparable harm, that it is likely to prevail on the merits, or that the another party or the public interest will not be harmed.

## II. SINCLAIR HAS NOT MADE A SUFFICIENT SHOWING UNDER *VIRGINIA PETROLEUM.*

Sinclair has not made a persuasive showing under the applicable four-part test for evaluating when a stay is appropriate in the D.C. Circuit. Under *Virginia Petroleum Jobbers Ass'n. v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958), the Sinclair must show that 1) it will suffer irreparable harm; 2) it is likely to prevail on the merits; 3) other parties will not suffer harm under the stay; and 4) a stay will not harm the public interest. *See also, Washington Metropolitan Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841, 843 (D.C. Cir. 1977).

### A. Sinclair will not Suffer Irreparable Harm

Sinclair argues that it will suffer irreparable harm. Stay Petition at 10-13. Its arguments are unpersuasive.

***Expected Return on Ten Year Contracts.*** Sinclair argues that it will be deprived of its expected of return on its investment over a ten-year period. Sinclair's expectation of financial benefit from their LMAs was completely unreasonable. Stay Petition at 10-11. The FCC had specifically cautioned all parties that LMAs were under review and might not survive. A party cannot suffer harm when its expectations of continued business operations were completely unreasonable. Sinclair's decision to move ahead despite its knowledge of likely impending regulatory change is the source of the harm. Sinclair's desire to be "saved" from poor business judgment should not be considered under *Virginia Petroleum*.

The record is abundantly clear that any party entering into an LMA after November 5, 1996 did so at its own risk. The Commission gave clear warning in the *Second Further Notice* of its intention to attribute LMAs entered into on or after November 5, 1996. *Second Further Notice of Proposed Rule Making,* 11 FCC Rcd 21655 (1996) ("*Second Further Notice*"). The Commission explicitly stated that "by specifying this date at this time, we provide notice that television LMAs entered into after the grandfathering date will not be grandfathered if television LMAs are ultimately found to be attributable." *Second Further Notice* at 21693, ¶ 88. The language of intent is indisputable: "We are inclined to grandfather all television LMAs entered into *before* the adoption date of this *Notice* for purposes of compliance with our ownership rules." *See Second Further Notice* at 21693, ¶ 89 (emphasis in original). "[T]elevision LMAs entered into *on or after* the adoption date of this *Notice* would be entered into at the risk of the contracting parties." *See id.* (emphasis in original). "These latter television LMAs . . . would not be grandfathered and would be accorded only a brief period in which to terminate." *Id.*

The Commission explicitly stated that the purpose of the declaration was "to provide certainty to television licensees who wish to make business decisions concerning television LMAs until the attribution issue is resolved." *Second Further Notice* at 21693, ¶ 88. Sinclair cannot now claim harm based on its fully informed decision to move ahead despite the Commission's warnings.

The present case is similar to *General Telephone Co. v. U.S.*, 449 F.2d 846 (5th Cir.1971), where the court upheld Commission rules prohibiting telephone companies from furnishing Community Antenna Television (CATV) service in their telephone service area. In that case, the court concluded that telephone operators could not justify reliance on the Commission's "putative acquiescence" to prohibit telephone companies from continuing to provide CATV service because the operators had been on notice for several years through numerous proceedings, including a NPRM, indicating that telephone company-CATV affiliations might be prohibited. *Id.* at 864-65. Similarly, petitioners cannot rely on the Commission's "putative acquiesce" that LMAs may be legal agreements, in light of the clear warning to the contrary.

As the Fifth Circuit found in *General Telephone Co.*, "[t]he property of regulated industries is held subject to such limitations as may reasonably be imposed upon it in the public interest and the courts have frequently recognized that new rules may abolish or modify pre-existing interests." *Id.* at 864; *see also FCC v. WJR, The Goodwill Station, Inc.*, 337 U.S. 265, 272 (1949) (a petitioner has no vested right in the "suppositious eventualities" of what the Commission may do at some time in the future); *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 1991 WL 201178, *9 (D.D.C.) ("Plaintiffs, by virtue of their participation in a comprehensively regulated industry, can hardly claim 'distinct investment-backed expectations.' The only reasonable expectation in such a heavily regulated field is that Congress would continue to regulate and that the rules were subject to change if necessary.") (citing *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-225 (1986) and *Penn Central Transportation Co. v. New York City*, 438 U.S. 102, 124 (1978)).

Moreover, although Sinclair states that LMAs were "perfectly legal," and implies there was never any question about their propriety, Stay Petition at 5, the contrary is true. The Commission has *never* deemed LMAs lawful. The legality of these combinations has been in question since their inception because they were always arguably unlawful transfers of control. The Commission has consistently scrutinized LMAs to determine whether they were unauthorized transfers of control under the applicable legal standard that had always applied to that question. *Stereo Broadcasters, Inc.*, 55 FCC2d 87 (1981), recon. den., 50 R.R.2d 1346 (1982). In addition, in 1995, the Mass Media Bureau issued guidance limiting the circumstances under which LMAs would be allowed when it considered whether an LMA was an unlawful transfer of control. *See* Public Notice No. 54161 (Mass Med. Bur. 1995). Finally, the Commission determined that LMAs effectuated a transfer of control since the 1990a, and the Commission has ordered forfeitures for violation of this rule. *See, e.g, First Broadcasting Corp.*, 3 FCC Rcd 2758 (1988); *Salem Broadcasting Inc.*, 6 FCC Rcd 4172, 4173 (Mass Med. Bur. 1991).

Sinclair's failure to achieve its projected return from the LMAs is also not irreparable harm: monetary damages are not generally considered irreparable.

> It is ... well settled that economic loss does not, in and of itself, constitute irreparable harm. As this court has noted: The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm. *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d at 925. ***Recoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business.*** *See Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 n. 2 (D.C. Cir.1977)."

*Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (emphasis added). While Sinclair attempts to analogize its circumstances to those in *Holiday Tours*, the comparison is inapposite. In *Holiday Tours*, the business at issue would cease to exist. There is no argument that Sinclair would cease to exist, or even cease to provide programming in all the markets at issue. Sinclair may not receive as much revenue as it projected, but this loss of revenue is not irreparable.[2]

***Inability to Resume Agreements/Good Will.*** Sinclair argues, with virtually no factual support, that it will be unable to reenter local marketing agreements with its current partners or other partners in the future, in the unlikely event that the FCC's rules are overturned. In support of this assertion, Sinclair submits the self-serving affidavit of David. B. Amy, a Sinclair officer. Mr. Amy proffers a conclusion that "if a station group were forced to terminate an LMA with a particular station, there would be relatively little likelihood that the group would be able to re-enter the market by doing a new LMA with that station or with a comparable one." His sole rationale in support of this conclusion is his observation that "[e]ach market and each television station within a market ... is unique." Affidavit at ¶ 7. This explanation should not persuade the FCC that Sinclair would be unable to renegotiate its LMAs The uniqueness of each station and each market did not prevent Sinclair from negotiating LMAs that exist now. Moreover, Sinclair could easily have forestalled the potential harm by negotiating clauses into its LMAs acknowledging the possibility of impending FCC action, or, by negotiating resumption clauses now. *See Washington Gas v. FERC*, 758 F.2d 669, 675 (stating that petitioners' ability to negotiate remedy to potential harm cut against a finding of irreparable harm).

[2] Such a decision would also be inconsistent with Commission precedent. In *KDEW*, a potential assignee of a radio station license argued that he was entitled to a stay of an order rescinding the grant of his assignment application and granting an application to transfer control of the license to a receiver. *Station KDEW(AM)*, 11 FCC Rcd 13683, 13686 (1996). The assignee argued that denial of the stay "completely destroyed" his business and therefore constituted irreparable harm within the meaning of *Holiday Tours*. The Commission held that any harm the assignee could suffer would not be irreparable because he anticipated resuming his business if a stay was granted, and any injury was therefore "temporary economic harm" which did not constitute irreparable injury. *Id.*

Mr. Amy also makes reference to a loss of "good will," but does not explain how Sinclair will lose good will under these circumstances. It is not sufficient to merely recite a loss of good will. *Washington Gas v. FERC*, 758 F.2d 669, 674. There is no evidence that Sinclair's business reputation will be undermined by application of the FCC's rule. Sinclair has four agreements with other sophisticated corporations that understand, as FCC licensees, the regulatory circumstances under which the agreements must be dissolved. It is unlikely that the four licensees or other potential LMA partners will fault Sinclair for compliance with the FCC's decision or attribute it to Sinclair's own failings.[3]

***Constitutional Arguments.*** Sinclair misrepresents the holding in *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1985) to support its claim that the FCC's rules constitute a taking under the Fifth Amendment. Sinclair Petition at 12. Contrary to Sinclair's claims, contractual rights are not automatically considered property rights subject to a takings analysis. "[T]he fact that legislation disregards or destroys existing contractual rights does not always transform the regulation into an illegal taking." *Connolly* at 244 (citing *Bowles v. Willingham*, 321 U.S. 503, 517, 64 S.Ct. 641, 648, 88 L.Ed. 892 (1944)). Moreover, when analyzing a regulatory taking, one of the three factors the Supreme Court has identified is the extent to which the regulation has interfered with reasonable investment-backed expectations. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). As demonstrated above, Sinclair had no reasonable investment-backed expectation

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[3] The Second Circuit considered the subtle differences among cases that hold loss of goodwill constitutes irreparable harm sufficient to justify injunctive relief. In *Tom Doherty Associates, Inc. v. Saban Entertainment, Inc.*, 60 F.3d 27, 37 (1995), the Second Circuit concluded that while it recognized irreparable harm when a party's business would be "obliterated" or when a relatively unique product that would affect the firm's performance, but that "only provable monetary damages from the loss of a profitable line of business" is not sufficient to be irreparable harm. *Id.* at 37.

of the benefit of LMAs for their full duration.

While it is true, as Sinclair argues, that courts often equate loss of a constitutional right with irreparable harm, Stay Petition at 12-13, the cases cited by Sinclair all apply to constitutional rights that cannot be compensated in money–namely the Eighth Amendment right not to be subject to cruel and unusual punishment, civil rights violations, and the constitutional right to an abortion. None of these rights which go to the heart of human dignity are remotely comparable to the right to obtain monetary compensation claimed by Sinclair.

Sinclair additionally argues that its First Amendment rights will be limited if a stay is not issued. Stay Petition at 12. In its rush to claim an injury where none exists, Sinclair forgets that the basic obligation to make decisions over programming belongs to the licensee and not to Sinclair. *Cosmopolitan Broadcasting Corporation*, 59 FCC 2d 558, recon. denied, 61 FCC 2d 257 (1976); *Roy R. Russo*, 5 FCC Rcd 5 FCC Rcd. 7735, 7587 (1990). Sinclair can claim no loss here.

Sinclair cites *Turner I* and *Time Warner II* to support its claim that its First Amendment rights are implicated. Stay Petition at 12. As explained in more detail below, *Turner I* and *Time Warner II* considered the First Amendment rights of cable operators. Broadcasters are considered under a more lenient constitutional standard. Thus, Sinclair has made no showing that the First Amendment right of a broadcaster would be implicated. As also explained below, the First Amendment rights of television viewers are also at stake, and, at a minimum, these offset Sinclair's argument that First Amendment concerns weigh in its favor.

### B. Sinclair Is Extremely Unlikely to Prevail on the Merits.

Sinclair's effort to establish its likelihood of success on the merits is an odd amalgam of unfounded assumptions, misstatements of the law and wishful thinking. Whatever else it may be, it is not persuasive.

### 1. First Amendment Claims.

Sinclair's initial argument is that the Commission violated the First Amendment in adopting rules which, for the first time, permit broadcasters to own two commercial television stations in many markets. Specifically, it challenges the Commission's action granting this new latitude only in markets where there would be at least eight independently owned and operated licensees. *Stay Pet.* at 13. This is not an argument Sinclair has previously advanced, a fact which itself raises questions about the sincerity with which it is now presented. Moreover, even leaving aside *res judicata* and other procedural infirmities, Sinclair's legal arguments are wholly unavailing.

#### a. *Red Lion* Governs Review of Broadcast Ownership Rules

Ignoring the Supreme Court's extensive consideration of local broadcast ownership rules in *NCCB v. FCC*, 436 U.S. 775, 801 (1978), Sinclair proceeds as if broadcasting is evaluated under the same intermediate scrutiny standard applicable to cable. Referring to the Commission's discussion of the importance of diversity, which cites *Turner Broadcasting System v. FCC*, 512 U.S. 622, 663 (1995) ("*Turner I*"), Sinclair makes but passing reference in a footnote to the appropriate and fully applicable standard for broadcasting enunciated in *Red Lion Broadcasting Co. v. FCC*, 395 U.S.367 (1969). *Stay Pet.* at 14, n.23. It is not *Turner I* which governs here. Rather, it is *Red Lion*, which sets forth the manner in which those interests must be balanced, taking into account the public's "paramount" First Amendment right to receive information." *Id.*, 395 U.S. at 390.

Sinclair borders on the meretricious in providing incomplete citations to not one, but two, vacated decisions upon which it places principle reliance. Both *U.S. West, Inc. v. United States*, 48 F. 3d 1092 (9th Cir. 1994), *vacated in* , 84 F. 3d 1153 (1996) and *Chesapeake & Potomac Tel. Co. v. United States*, 42 F. 3d 181 (4th Cir. 1994), *vacated in,* 516 U.S. 415 (1996) were vacated, and are not valid precedent worthy of citation to the FCC or any Court. Moreover, these two moot cases are otherwise inapposite because they did not address broadcast ownership issues. The Commission and the courts have consistently applied different ownership rules to disparate media. *See generally* Zuckman, Harvey *et al.* Modern Communications Law, 1196 - 1213 (1999).

Sinclair's reliance on the recent decision in *Time Warner v. FCC,* 240 F.3d 1126 (D.C. Cir. 2001) has virtue of referring to a valid, if as yet non-final, precedent. But in that case, the Court held that the statute, by its terms, precluded the Commission from considering diversity in adopting its rules. *Id.*, 240 F.3d at 1135-36. By contrast, the Commission's evaluation of diversity as well as competition in crafting broadcasting rules has been upheld by the Supreme Court. In NCCB v. FCC, 436 U.S. at 795-96, the Court found that it lies squarely within the FCC's discretionary powers to decide where to strike the proper balance between these two goals.

Implicit in the Sinclair's argument is the claim that *Red Lion* is bad law. It is true that, some seventeen years ago, the Supreme Court indicated that it might reexamine spectrum scarcity if there were "some signal from Congress or the FCC that technological developments have advanced so far that some revision fo the system of broadcast regulation may be required," *FCC v. League of Women Voters*, 468 U.S. 364, 376-77 n. 11 (1984).

No such "signals" have been forthcoming.

Over the last decade, the changing composition of the Court has consistently invoked, and relied upon, the scarcity-based trusteeship principles explicated in *Red Lion.* See, *e.g.*, *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, 673 (1998) (pointing to programming mandates); *id.* at 687-88 (Ginsberg, J., dissenting) ("Congress chose a system of private broadcasters licensed and regulated by the government"); *Reno v. ACLU*, 521 U.S. 844, 868 (1997); *Turner Broadcasting Co. v. FCC*, 520 U.S. 180, 227-228 (1997)("*Turner II*") (Breyer, J. concurring); *Turner Broadcasting Co. v. FCC*, 512 U.S. 622, 637-638 (1994) ("*Turner I*") ("As a general matter, there are more would-be broadcasters than frequencies available"); *id.*, 512 US at 685 (Ginsberg, J. concurring)(noting "that a cable system, physically dependent upon he availability of space along city streets...therefore constitutes a kind of bottleneck"); *Metro Broadcasting Co. v. FCC*, 497 U.S. 547, 566-67 (1990), *overruled in part by Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *id.*, 497 U.S. at 615 (O'Connor, J., dissenting).

In the meantime, Congress has also declined to alter its treatment of over-the-air broadcasting, even as it has significantly altered the regulatory scheme to introduce competition in other wireless technologies. This has had the effect of increasing the scarcity and value of spectrum which can be used for over-the-air broadcasting. In the Children's Television Act of 1990, Pub. L. 101-437, *codified at* 47 U.S.C. §303(a), Congress invoked spectrum scarcity to impose stringent new mandates for programming directed to children and restrict commercialization during such programming.[4] In 1992, it enacted 47 U.S.C. §335, which specifically extended existing political broadcasting and other programming requirements to direct broadcast satellite licensees regulated as broadcasters, *see Time Warner Entertainment Co. v. FCC*, 97 F.3d 957, 975-976 (D.C. Cir. 1996), *reh'g. denied*, 105 F.3d 723 (1997).

Of greatest immediate significance, in 1996, in §201(a)(1) of the 1996 Telecommunications Act, Congress provided for a transition to digital television technology, using newly available spectrum,[5] but directed that the FCC "should limit the initial eligibility for such licenses to" incum

[4]For example, with specific reference to *Red Lion*, the House Committee said that "The opportunity to 'speak' over a broadcast station inherently is not available to all. As a result, broadcast licensees have been licensed as public trustees....A fundamental part of that duty is the obligation to serve children, who constitute a unique segment of the television audience." H.R. Rep. No. 101-385, 101st Cong., 1st Sess. 8 (1990).

[5] "Rewarding broadcasters for building the new service, the law permits them...to add more spectrum on to their existing licensed spectrum...Mostly, it is taken away from other small broad-

bent television licensees. Section 204(a) specifically reenacted the spectrum-scarcity-grounded public interest standard as the basis on which broadcast license renewals are to be granted, although licensees are now afforded greater latitude with respect to minor violations which might have previously interfered with renewal. *Id.*, *amending* 47 USC *§309(k).* The 1996 Act also eliminated the right for competing applicants to challenge license renewals, and otherwise provided significant additional assurances that incumbent licensees will not be forced to surrender such spectrum as they control. In particular, Section 203 extended the term of licenses to eight years.

### b. The Commission's Rules Do Not Restrict Speech

Whatever constitutional standard may be applied, the Commission's rules to not restrict Sinclair's speech rights.

First, and most importantly, Sinclair fails to mention, much less explain how its speech rights are restricted here. The rules adopted here permit it to speak to every single viewer residing in the service area of its TV stations. Sinclair cites no case law - nor is there any - which holds that broadcasters have a right to speak ***twice simultaneously*** to local citizens on two stations.

Half-heartedly dismissing studies establishing a nexus between diversity of ownership and diversity of speech, Sinclair claims that the Commission has failed to establish that there is any benefit from limiting TV duopoly to the larger U.S. markets. *Stay Petition*, at 14, n.24.

The nexus between diversity in broadcast ownership and diversity in programming is one that has been repeatedly recognized and reaffirmed by the Commission and the Supreme Court. Moreover, in addition to the studies and other record evidence the FCC has cited, there is ample anecdotal evidence demonstrating the connection between ownership and content. Broadcasters use

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casters, most of whom held their licenses on a second-class or temporary basis." Aufderheide, Communications Policy and the Public Interest 69 (Guilford, 1999).

their editorial judgment every day to determine content in numerous ways, including shaping news coverage and selecting programming. Furthermore, it is only natural that journalists take into account the viewpoints and dispositions of the owners who employ them when writing and presenting stories, since it is those owners who make final decisions about what is broadcast on their stations. Sinclair's request is equivalent to demanding that the FCC prove that the sky is blue.

The Commission has consistently determined that station ownership has a strong influence on programming and therefore has strived to promote diversity on the public airwaves through diversity of ownership. Achieving a diversity of viewpoints is an important part of the Commission's public interest mandate. And historically, that mandate is accomplished in part through promoting diversity in ownership. *See e.g., Second Report and Order, In the Matter of Amendment of Sections 73.34, 73.240 & 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM & Television Broadcast Stations*, 50 FCC 2d 1079-1080 (1975). Relying on this history and several studies, as well as Supreme Court precedent, the Commission correctly reaffirmed the nexus in the *Local Ownership Order,* concluding that "intuitive logic and common sense support our belief that the identity and viewpoint of a station's owner can in fact influence the station's programming." *See Local Ownership Order* 14 FCC Rcd at 12914-15, ¶ 22.

Time and time again, the Supreme Court has indicated that a nexus between ownership and content inevitably exists as a result of the editorial discretion protected by the First Amendment.[6] The Court has recognized that ensuring public access to a multiplicity of information sources is a governmental purpose of the "highest order." *See Turner I,* 512 U.S. at 636. The Court has also

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[6] *See generally, Miami Herald Publishing Co. Tornillo*, 418 U.S. 241, 254 (1974) (reaffirming the protection afforded to editorial judgment); *Red Lion,* 395 U.S. at 393 (upholding regulations requiring a broadcaster to afford a right of reply partially because of a finding that such regulations do not interfere with broadcasters' broader editorial discretion).

long considered that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *See id* at 636 (*citing Associated Press v. United States*, 326 U.S. 1, 20 (1945)). In pursuance of this First Amendment principle, the Court has upheld the Commission's ownership rules finding that the FCC "acted rationally in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints." *FCC v. National Citizens Committee for Broadcasting et al.*, 436 U.S. 775, 795 (1978) (upholding the ban on common ownership of newspapers and broadcast stations in a local market).

Most recently, the Court explained that the nexus is merely a natural consequence of our broadcasting system under the First Amendment since broadcasters are "required to exercise substantial editorial discretion in the selection and presentation of their programming."*Arkansas Educational Television Commission v. Forbes*, 118 S. Ct. 1633, 1639 (1998). In *Forbes*, the Court affirmed the connection between who is in charge of a station and the content on that station when it rejected giving outside speakers broad rights of access to a television broadcasting station. *See id.* Concluding that a broadcaster, by its nature, "will facilitate the expression of some viewpoints instead of others," the Court refused to set up "pre-established criteria for access" for fear that it would interfere with the "exercise of journalistic discretion." *Id.*, at 1639.

**2. Takings Claims.**

Sinclair is on no better footing in arguing that the Commission's eight voices test rises to a taking in violation of its due process rights under the Fifth Amendment.

**a. The Legal Status of LMA's**

Even though the FCC has never previously held that LMA's were a lawful practice prior to the 1996 Act, Sinclair starts from the plainly bogus premise that it was on solid legal footing in establishing LMA's in the first place. As discussed above, the Commission has persuasively demonstrated why this was not the case, and additionally, that broadcasters were on notice such that they had no reason to believe that the FCC might not subsequently delimit the use of LMAs.

Sinclair cannot credibly argue that the Commission's interpretation of Section 202(g) is "arbitrary, capricious or manifestly contrary to the statute." *Id.* The Commission reasonably interpreted the plain language of section 202(g) as precluding the Commission from prohibiting any television LMAs that are in compliance with its rules. *See Local Ownership Order* 14 FCC Rcd at 12961, ¶ 134. Recognizing its inherent power under Titles I and III to regulate the status of LMAs, the Commission accurately ascertained that the "plain language of the statute does not require us to grandfather LMAs permanently." *Id.* at ¶ 135 - 136. Rather, the Commission interpreted section 202(g) as giving it "the discretion to adopt policies that avoid undue disruption of existing LMA arrangements while, at the same time, promote our competition and diversity goals." *Id.*

Accordingly, the Commission determination that limiting the grandfathering relief of LMAs to those entered into before November 5, 1996 is a well balanced decision that addresses the "equity, competition, and diversity issues these arrangements raise." *Local Ownership Order,* 14 FCC Rcd at 12963 at ¶ 138. The Commission reasonably chose November 5, 1996 as the cut-off because on that date it "gave clear notice that it intended to attribute television LMAs in certain circumstances, and that LMAs entered into on or after that date that violated our local television ownership rule would not be grandfathered and would be accorded only a fixed period in which to terminate." *Id., 14 FCC Rcd at 12963,* ¶ 139. This is a convincing rationale for distinguishing between LMAs entered into before November 5, 1996 and those formed afterward. The scales of equity weigh much more in favor of those parties who arguably had no notice of LMAs' attribution, as opposed to those who entered into these questionable combinations in the face of such clear warning.

b. **Sinclair has no property interest in its LMA contracts.**

Sinclair's takings arguments do not merit serious attention or extended discussion beyond the showing already made here demonstrating that Sinclair will not suffer legally cognizable injury, much less irreparable harm, from the Commission's termination of LMA agreements,[7] and that the FCC has not misinterpreted the 1996 Act. For immediate purposes, it is sufficient here to note that there is no legal basis for invalidation of an otherwise permissible regulation on the grounds that it implements a regulatory taking. Even if there had been such a taking, Sinclair's available remedy is to seek compensation under the Tucker Act or another appropriate statute. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

3. **APA Challenges**

Sinclair cannot plausibly claim that it has a strong likelihood of demonstrating that the Commission's action here was arbitrary and capricious. Its arguments to that effect are no more than a rehash of arguments which the Commission has decisively and thoroughly rejected in its reconsideration order earlier this year.

C. **Harm to the Public and the Public Interest will Result from a Stay.**

Not surprisingly, Sinclair gives short shrift to the final two, and equally important, prongs of the *Virginia Petroleum* test. In two sparse paragraphs, Sinclair alleges that no interested party will be harmed by a stay and that the public interest is served by a stay. Stay Petition at 21. Neither

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[7] The Commission's power to abrogate contracts which are contrary to the public interest is not seriously in dispute. Indeed, nearly six decades ago, the Supreme Court authorized network "chain broadcasting" contracts not dissimilar in some respects from provisions in Sinclair's LMA agreements. *See, NBC v. United States*, 319 U.S.190 (943). Even the staff decisions upon which Sinclair relies in attempting to establish the validity of LMA's emphasize that FCC licensees may not delegate public interest programming authority, *see, e.g, Siete Grande Television, Inc.* 11 FCC Rcd 21154, 21156 (1996). and that any such agreements are inherently voidable. *Id.*

of these allegations is true, and Sinclair's audacity to ignore the important concerns raised under these prongs demonstrates Sinclair's fundamental lack of consideration for the viewing public. The party that will be harmed ***is*** the viewing public. FCC regulation of the broadcast medium is to ensure that the viewing public receives its news and information–the lifeblood of a representative democracy–from government licensees who serve the public and not only their own economic interests. In addition, if this stay is granted, the public interest will be harmed because it will endanger precedent ensuring finality of all the Commission's orders, and finality of its recent ownership decisions will likely become non-existent.

***The Public's First Amendment Rights.*** Sinclair argues that no party will be harmed by the grant of its request. Stay Petition at 21. In making this allegation, Sinclair ignores the interests of the American viewing public–the citizens who are the intended beneficiary both of the Commission's rules and of the analysis that this Court must perform to grant injunctive relief. *See Red Lion Broadcasting Co. v. FCC,* 395 U.S. 267, 389-92 (1969); *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966). Under the third and fourth prongs of the *Virginia Petroleum Jobbers/Holiday Tours* test, the Commission must evaluate whether any other parties will be harmed by the requested relief and how the public interest will be affected. *Virginia Petroleum Jobbers*, 259 F.2d at 925; *Holiday Tours*, 559 F.2d at 843.

Members of the public, individually and collectively, will be harmed if Sinclair does not comply with the Commission's orders. Grant of Sinclair's request will deprive the public of diversity in the marketplace of ideas and  and of competition in the economic marketplace. The First Amendment, an FCC rulemaking decision, and valid FCC rules each provide benefits to which the public is entitled. Moreover, the losses of these rights are not speculative, but certain to occur if Sinclair's compliance is avoided.

Sinclair claims that it will lose its First Amendment rights if it complies with the FCC's decisions. Stay Petition at 12. Sinclair ignores that there are competing rights at issue here, and that the balance in this instance is strongly weighted towards the public. Speaking for a unanimous Court, Justice White has said that

> [T]he First Amendment...has a major role to play as the Congress itself recognized in [47 USC §] 326, which forbids FCC interference with "the right of free speech by means of radio communication." Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. ***It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.*** See *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940); *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 361-362 (1955); 2 Z. Chafee, Government and Mass Communications 546 (1947). It is the purpose of the First Amendment to preserve an uninhibited market-place of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). See Brennan, The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 Harv. L. Rev. 1 (1965). ***It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.*** That right may not constitutionally be abridged either by Congress or by the FCC.

*Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 389-90 (emphases added). As the Supreme Court has more recently said, "assuring the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment." *Turner I*, 512 U.S. at 662-63. Expanding on this in *Turner II*, the Court explained:

> Federal policy, however, has long favored preserving a multiplicity of broadcast outlets....Broadcast television is an important source of information to many Americans. Though it is but one of many means of communication, by tradition and use for decades now it has been an essential part of the national discourse on subjects across the whole broad spectrum of speech, thought and expression. Congress has an interest in preserving a multiplicity of broadcasters to ensure that all households

have access to information and entertainment.

*Turner II*, 520 U.S. at 194 (citations omitted). By contrast, for over 70 years, the Supreme Court has consistently held that entities have no First Amendment right to speak to the public via a broadcast license. *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 799 (1978); *Red Lion*, 395 U.S. at 388.

***Finality of the Commission's decisions will be Jeopardized.*** Sinclair's situation does not differ from any of the entities subject to the Commission's *Local Ownership Order*. If the FCC grants Sinclair's stay, logically compliance of all similarly situated parties must also be deferred. Moreover, this practice may extend to any of the many Commission decisions that implicate ownership. Such action would set dangerous precedent completely at odds with prior law and practice with regard to Commission orders because ordinarily, an order by a Federal agency is presumed lawful and enforceable until it is shown to be invalid.

In just one example of what will be challenged in the future, in the *Local Ownership Order*, the Commission determined that "[w]hether LMA holders obtain a duopoly outright or permanent grandfathering relief for arrangements that do not comply with our new TV duopoly rule and waiver policies, such relief will not be extended to any transfers subsequent to 2004; any transfer of permanently grandfathered arrangements after that time must meet our duopoly rule or waiver policies in effect at the time of transfer." 14 FCC Rcd 12,903, 12965 (1999). If Sinclair's request is granted, and the members of industry do not receive a strong signal that stays will not be routinely granted, this *Local Ownership* decision will be just one in an extremely long line of FCC decisions that will be challenged in court, if only to forestall their application during the pendency of litigation. Sinclair's request demonstrates that the warnings the Consumer Federation of America and UCC set before the D.C. Circuit *Fox v. FCC* are sadly bearing fruit. *See Initial Brief of Intervenors/Amici*

*Curiae Consumer Federation of America and United Church of Christ, Office of Communications, Inc.*, D.C. Cir Nos. 00-1222 and 01-1263 *et al.* (May 7, 2001) at 10.

## III. CONCLUSION

For the foregoing reasons Sinclair's request for stay should not be granted.

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## CERTIFICATE OF SERVICE

I certify the forgoing UCC, *et al.* Opposition to Emergency Petition for Stay by Sinclair Broadcasting Group, Inc., was provided to the following by electronic mail on May 16, 2001 and via fascimile and by hand on May 17, 2001:

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